IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
November 10, 2009 Session

STATE OF TENNESSEE v. RICHARD ODOM

Direct Appeal from the Criminal Court for Shelby County
No. 91-07049 Chris Craft, Judge

No. W2008-02464-CCA-R3-DD - March 4, 2010

The defendant, Richard Odom, appeals as of right his sentence of death resulting from the May 10, 1991, murder of Mina Ethel Johnson. A Shelby County jury convicted the defendant of first degree murder committed in the perpetration of rape. Following a separate sentencing hearing, the jury found that the proof supported three aggravating circumstances beyond a reasonable doubt: (1) the defendant had been previously convicted of one or more violent felonies, Tenn. Code Ann. § 39-13-204(i)(2); (2) the murder was especially heinous, atrocious, or cruel, Tenn. Code Ann. § 39-13-204(i)(5); and (3) the murder was committed during the defendant's escape from lawful custody or from a place of lawful confinement, Tenn. Code Ann. § 39-13-204(i)(8), and sentenced the defendant to death by electrocution. On direct appeal, the Tennessee Supreme Court affirmed the defendant's conviction for first degree murder but reversed the sentence of death and remanded for a new sentencing hearing. See State v. Odom, 928 S.W.2d 18, 21 (Tenn. 1996). Specifically, the supreme court found that reversible error was committed in the sentencing phase in that (1) the proof did not support application of the (i)(5), heinous, atrocious, cruel aggravating circumstance; (2) the evidence did not support the jury's finding that the defendant committed the murder during an escape from lawful custody, (i)(8); (3) the trial court failed to permit the defendant to present the mitigating testimony of Dr. John Hutson; and (4) the trial court failed to properly instruct the jury as to nonstatutory mitigating circumstances. Id. Accordingly, the case was remanded to the trial court for resentencing. At the conclusion of the resentencing hearing which commenced on September 28, 1999, the jury found the presence of one aggravating circumstance, the defendant had been previously convicted of one or more violent felonies, Tenn. Code Ann. § 39-13-204(i)(2). The jury further determined that the mitigating circumstances did not outweigh the aggravating circumstances and imposed a sentence of death. The trial court approved the sentencing verdict. This court affirmed the sentence, but the Tennessee Supreme Court again reversed, finding that evidence of the prior violent felony offense was improperly admitted. State v. Odom, 137 S.W.3d 572, 580-83 (Tenn. 2004). A third resentencing hearing was held on December 3, 2007. The jury found

the presence of two aggravating circumstances: the defendant had previously been convicted of a prior violent felony and the murder was committed during an attempt to commit a robbery. See Tenn. Code Ann. § 39-13-204(i)(2), (7). The jury further determined that the mitigating circumstances did not outweigh the aggravating circumstances and, again, imposed a sentence of death. The defendant appeals, presenting for our review the following claims: (1) the trial court erred in granting a challenge for cause to a juror; (2) the trial court erred in admitting crime scene photographs; (3) the jury instruction on parole eligibility violated his right to due process; (4) the criteria of Tennessee Code Annotated section 39-13-206(c)(1) have not been satisfied in the present case; (5) his waiver of his right to testify was not knowingly, intelligently, or voluntarily made; (6) the reasonable doubt instruction violated his constitutional rights; and (7) Tennessee's death penalty scheme is unconstitutional. Following our review, we affirm the jury's imposition of the sentence of death in this case.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and J.C. MCLIN, JJ., joined.

Brock Mehler, Nashville, Tennessee (on appeal); Gerald Skahan (on appeal and at trial) and Marty McAfee (at trial), Memphis, Tennessee, for the appellant, Richard Odom.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Mark E. Davidson, Senior Counsel; William L. Gibbons, District Attorney General; and Robert Carter and Amy Weirich, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTS

Although not at issue in this appeal, the factual findings developed during the guilt phase and summarized by our supreme court in the original direct appeal are as follows:

> The record indicates that at approximately 1:15 p.m. on May 10, 1991, Ms. Mina Ethel Johnson left the residence of her sister, Ms. Mary Louise Long, to keep a 2:30 p.m. appointment with her podiatrist, Stanley Zellner, D.P.M. She agreed to purchase a few groceries while she was out. Johnson had not returned at 5:00 p.m.; this delay prompted Long to call Zellner. He told Long that Johnson had not kept her appointment. As a result of a

subsequent call from Long, Zellner agreed to return to his office and look for Johnson's car in the parking garage. He located her car in the parking garage and observed her body inside. He went immediately to the Union Avenue police precinct and notified officers.

Investigating officers found Johnson's body on the rear floorboard of her car with her face down in the back seat. Her dress was up over her back, and an undergarment was around her ankles. One of several latent fingerprints lifted from the "left rear seat belt fastener" of Johnson's car matched a fingerprint belonging to the defendant, Richard Odom, alias Otis Smith.

The medical examiner testified that Johnson had suffered multiple stab wounds to the body, including penetrating wounds to the heart, lung, and liver. These wounds caused internal bleeding and, ultimately, death. The medical examiner noted "defensive" wounds on her hands. Further examination revealed a tear in the vaginal wall and the presence of semen inside the vagina. In the medical examiner's opinion, death was neither instantaneous nor immediate to the wounds but had occurred "rather quickly."

Three days after the incident, Sergeant Ronnie McWilliams of the Homicide Unit, Memphis Police Department, arrested the defendant. As a result of a search incident to arrest, McWilliams confiscated a large, open, lock-blade knife from the defendant. When they arrived at the homicide office, McWilliams told the defendant of the charges against him and read his Miranda rights to him. The defendant executed a "Waiver of Rights" form, signing "Otis Smith." A short time later he acknowledged having identified himself falsely, executed a second rights waiver by signing "Richard Odom" and gave McWilliams a complete, written statement.

In his statement, the defendant said that his initial intention was to accost Johnson and "snatch" her purse after having seen her in the parking garage beside her car. He ran to her and grabbed her; both of them fell into the front seat. He then pushed her over the console into the rear seat. He "cut" Johnson with his knife. Johnson addressed him as "son." This appellation apparently enraged the defendant; he responded that "[he] would give her a son." He penetrated her vaginally; he felt that Johnson was then still alive because she spoke to him. Beyond the first wound, the defendant claimed not to have remembered inflicting the other stab wounds. Thereafter, the defendant climbed into the front seat and rifled through Johnson's purse. He found nothing of value to him, except the car keys, which he later discarded.

He then went to an abandoned building where he had clothing and changed clothes.

Odom, 928 S.W.2d at 21-22.

Proof at the Resentencing Hearing

John Sullivan, a retired State Farm Insurance agent and friend of the victim's family, testified that on May 10, 1991, the victim's sister, Louise Long, telephoned him to inform him that the victim was missing. Long advised Sullivan that the two sisters were to have had lunch together, but the victim never arrived. Long was quite upset, and Sullivan agreed to go to her home. Long told Sullivan that the victim had missed an appointment with her podiatrist and that she had reported her sister's disappearance to the Memphis Police Department. Sullivan suggested that they follow the route the victim would have taken to her doctor's appointment.

Sullivan and Long drove west on Walnut Grove Road to Union Extended. They turned right on Cooper and then left on Madison, and drove to the parking garage at Madison and Pauline. The parking garage served a number of facilities around the medical district and would have been where the victim would have parked for her doctor's appointment. Sullivan drove into the garage and circled each floor, looking for the victim's blue Chevrolet Nova. On the top floor of the garage, Sullivan observed a police cruiser and then turned around and headed back to the ground floor. On the way down, he saw a vehicle he thought belonged to the victim. He parked his vehicle and walked toward the vehicle to investigate.

Sullivan noticed the Nashville tag on the front of the vehicle which confirmed that the vehicle was indeed the victim's. He then looked into the car and saw the victim's body on the floor in the back of the vehicle. Sullivan observed that the victim's clothes were disheveled and what appeared to be bloodstains on the front seat of the car. Sullivan returned to his vehicle and drove toward the entrance of the garage. He spotted the police cruiser he had seen earlier and informed the officer of his discovery.

Memphis Police Officer Donna Bullock Locastro testified that she and Officer Don Crowe responded to the call regarding the disappearance of the victim. The officers went to the parking garage at Madison and Pauline where they discovered another officer at the victim's vehicle. The officers observed the victim's body in the backseat of the vehicle and noticed that she was "clutching what appeared to be a check." Officer Locastro stated it was obvious that the victim "was dead and was beyond resuscitation." The officers contacted the homicide division and secured the scene.

Ronnie McWilliams testified that in May 1991 he was a sergeant with the Memphis Police Department Homicide Division and was assigned to the victim's murder case the following morning. A fingerprint belonging to Otis Smith was found in the victim's vehicle. Smith was subsequently located on Jefferson Avenue, and McWilliams and his partner placed Smith under arrest on May 13, 1991. Smith had an "Old Timer's Light Blade Knife" on his person at the time of his arrest. McWilliams identified the defendant in the courtroom as the man he located and knew as Otis Smith.

McWilliams said that Otis Smith was advised of his rights and signed a waiver of those rights. He said that Otis Smith also signed his name as Richard Odom and advised the officers that his real name was Richard Odom, not Otis Smith. The defendant then provided a statement admitting that he murdered a woman driving a blue car in the parking garage. He stated that the murder weapon was an Old Timer buck knife. He continued:

> I was tired. I knew of the staircase in this garage and I called myself going to get a little rest. I sat down and called myself relaxing. This lady came through the stairway door. I felt like I was going to get in some trouble with people coming and going, so I come out of the staircase and went toward the elevator. This blue car I saw coming around the garage. I noticed it had a woman in it. I figured if I catch her when she stops and snatch her purse I would gone on back over here in Midtown and get something to eat and catch a nap. Somewhere along the line I lost her. When I did spot her again, she was coming from the back of the car towards the driver's door. I run over there with the intentions of snatching her purse and running. When I reached the garage – when I reached and grabbed her hand, I somehow grabbed her arm or hand or whatever and we kind of fell back into the car. Somehow I slid my body around into the car, pulled her when I fell in or went in or whatever. By some of the experiences I've been through in Midtown, I always kept my knife open. It was within that small of my back pants loop. Pushing the lady off of me and over the back seat, somehow or another, I managed to get my knife while doing so. I cut her, I guess. I remember she was bleeding. The lady called me, son, and I told her, I would give her a son. I went to the back of the seat with her. I don't know if I stabbed her when I got in the back seat with her or when I got back in the front seat. Once I was back in the front seat, I remember looking through the blue wallet or the pocketbook. It looked like Medicare cards or dollar coupons and a blank check. I threw it all on the floor of the car and somewhere up in there and left. When I left, I went down . . . the stairs to where the door opens up on the bottom of the stairs and there was a man seated in the booth at the parking garage. I threw the keys into a hole and I heard them when they hit the other side of the door. I come back around

> the stairs to the elevator and went to the main floor and out the door. I proceeded to go off into the distance of Midtown.

The defendant admitted having sexual intercourse with the victim but could not recall whether it was vaginal or anal sex. He said that she was alive when he had sex with her because he remembered her saying that "she had never had sex before." He could not recall if he stabbed her before or after he had sex with her. The defendant informed the officers that he had killed Becky Roberts in May 1978. He further stated that he needed "help mentally and psychologically."

Dr. Jerry Thomas Francisco testified that he performed an autopsy on the victim on May 11, 1991. Dr. Francisco reported that the victim was five feet, six inches tall and weighed one hundred and thirteen pounds. He observed multiple stab wounds to her body, one to the front of the chest and two to the right side toward the back. Dr. Francisco observed defensive wounds to the victim's right hand and a tear at the back part of the vaginal orifice. Dr. Francisco noted that the wound to the victim's vagina was the result of forcible penetration by some object. Regarding the stab wounds, Dr. Francisco noted that the stab wound to the front of the victim's chest passed into the right side of her heart, producing two tears in the heart. The stab wound to the right side of the chest toward the back penetrated the chest cavity into the right lung, producing a tear of the right lung with bleeding into the right lung cavity. The third stab wound was to the right posterior part of the back, which passed into the abdominal cavity and the liver, producing bleeding into the peritoneal cavity. Dr. Francisco stated that all of these stab wounds were classified as lethal wounds in that they had the capacity to cause death.

Dr. Francisco stated that the cause of the victim's death was exsanguination, or bleeding out; that is, the person dies because there is not enough blood for the heart to pump the blood through the body. Dr. Francisco stated that the time of death could be measured in minutes ranging anywhere from sixty minutes to one hundred and twenty minutes. Dr. Francisco opined that the victim was alive when all of the wounds were inflicted. He added that samples collected from the victim's vaginal area revealed the presence of sperm and enzymes that are present in seminal fluid.

Louise Long,[1] the victim's sister, testified that the victim was seventy-eight years old on May 10, 1991. Long stated that the victim had been with her that day until 1:00 p.m. when she left for an appointment with Dr. Zellner. Because Long was sick in bed that day, she asked the victim to buy some groceries for her on the way back from her doctor's

[1]Barbara Colby read the transcript of Long's previous testimony. Long had passed away prior to the resentencing trial.

appointment. When she had not heard from her sister at 4:30 p.m., Long contacted Dr. Zellner's office and was informed that her sister had failed to make her appointment. Long then contacted the police department and John Sullivan.

Mary Jane Lemon testified that, in 1998, she was an assistant district attorney in the Rankin County Mississippi District Attorney's Office. She recalled that in the summer of 1998, she tried the case, State of Mississippi v. Richard Odom. She explained that the defendant had been charged with the May 1978 murder of Mary Rebecca Roberts. On July 29, 1998, the defendant was found guilty of the murder and received a sentence of life imprisonment.

Glori Shettles, a mitigation investigator with Inquisitor Incorporated, testified that she was employed to prepare and investigate mitigation evidence regarding the defendant. She prepared a social history and a PowerPoint presentation titled "Putting the Pieces Together, Understanding Richard Odom." She stated that her purpose in creating these documents was to give the jury better information in making an assessment about the defendant. Shettles stated that the defendant had a "very weak foundation from the very beginning." His parents, Norman and Nellie Smith, were very young when they married and when the defendant was born. The defendant's mother had been sexually abused by her stepfather. Shettles opined that, because of this abuse, Mrs. Smith wanted to leave home and did so by marrying at the age of fifteen. The defendant's parents were married in May 1958. The defendant was born in Mississippi on August 13, 1960, when his father was twenty years old and his mother was seventeen years old. The defendant's birth name was Richard Lloyd Smith.

Shettles said that, prior to the defendant's birth, his parents had one daughter, Kathy, and then had another daughter in 1962. His parents' marriage was unstable; they fought over money and her desire not to be there. His mother had three children by the age of nineteen and frequently abandoned the family. During her absences, the children were cared for by their father, daycare, and even themselves. Shettles reported that, prior to the age of two and a half, the defendant's feet[2] had been so badly burned that he was unable to wear socks and shoes for quite some time. Norman and Nellie Smith ultimately divorced.

Shettles said that the Smith children were sometimes left at the daycare center for days. At one point, the State of Mississippi was about to intervene as a result of complaints from the daycare regarding the Smiths' neglect of their children. Gladys McClendon, an employee of the daycare, contacted the Odom family about adopting the children. It appeared that Mrs. Smith had no interest in keeping the children and that, although Mr. Smith

[2]Later in the evidentiary hearing, the defendant's aunt, Dorothy Rowell, testified that she had been told that the burns resulted from the defendant's standing on the register of a floor furnace.

did not want the children to be adopted, he knew it would be very difficult for him to keep them. The defendant was adopted by Jimmy and Shirley Odom on March 8, 1963, prior to his third birthday, and his birth certificate was changed to reflect his name as Richard Odom. Kathy was adopted by Jimmy's sister, Peggy, and her husband. The youngest child, Carol, was adopted by Jimmy Odom's parents. Mr. Smith tried to stay in contact with his children after their adoption, but his attempts to contact the defendant were thwarted by Shirley Odom.

Shettles said that Mr. Smith admitted that he drank alcohol "quite a bit" when he was younger, and he described Mrs. Smith as a social drinker who liked to frequent bars. Mrs. Smith had another child, whom she gave up as well when he was six years old. Mrs. Smith eventually had contact with her daughters and told Kathy that she was not "mother material." Mr. Smith remarried in 1964 and had one more child. Shettles testified that Mr. Smith was still alive and that she had asked him to come to the defendant's trial. However, Mr. Smith, who was in poor health, said that the trial would be too stressful for him. Mrs. Smith was also alive at the time of the trial but refused to talk with Shettles.

Shettles said that Jimmy and Shirley Odom had three children of their own, Cindy, age 7; Jimmy, Jr., age 6; and Larry, age 2, when they adopted the defendant. The defendant was several months older than Larry. Shettles stated that Jimmy Odom was not physically abusive to the defendant, but he had a temper and was "very, very loud." Shettles stated that the defendant was fearful of Jimmy Odom, but she was not certain of the basis of the fear. At some point after the adoption, Jimmy Odom had an affair with Nellie Smith. Shettles opined that this caused Shirley Odom's attitude toward the defendant to change. In 1964, Jimmy and Shirley Odom divorced, due largely to Mr. Odom's "excessive drinking and womanizing." Both parents remarried, and the defendant had little contact with Jimmy Odom after the divorce. Shettles summarized the defendant's life up to age five as follows: the defendant was abandoned by his biological parents, adopted by another family, separated from his sisters, got three new adopted siblings, and got a new stepfather after his adoptive parents divorced.

Shirley Odom married Marvin Bruce, and in 1965 they had a child, followed by two more in 1971 and 1972. Shettles described Mr. Bruce as "just very harsh in his method of discipline as far as beatings." Shettles related that Mr. Bruce treated the defendant and Larry Odom similarly. She reported that Larry Odom was currently in the Oregon State Penitentiary serving a seventy-five-month sentence for sexual battery, which involved two boys under the age of fourteen.

Shettles reported that the defendant wet the bed for a long time as a child and also walked in his sleep. Mr. Bruce belittled the defendant and humiliated him by hanging his

sheets outside for everyone to see. Shettles also reported that Mr. Bruce sexually abused the defendant and Larry Odom. She explained that Mr. Bruce had the two boys take baths together and "would scrub them excessively and while he would do that, he would pull and tug on their penis." Mr. Bruce also called them names and made fun of them.

Shettles said that Shirley Odom treated the defendant differently from her biological children. She favored her own children with material items over the defendant. Gladys McClendon, the defendant's adoptive grandmother, did not like the defendant, was "cold and cursed him," yanked him by the arm, and yelled at him. Shettles also reported that she was told that the defendant was always hungry as a child. She stated that Mr. Bruce always put hot sauce on any food he shared with the defendant.

At the age of twelve, the defendant became involved with the juvenile court system because he ran away from the Bruce home. One time, there was a report on the Jackson, Mississippi news that the police were looking for the defendant and that he had been found in an abandoned house. Norman Smith saw the report and tried to find the defendant. When the defendant was fourteen years old, he received a psychological evaluation by Dr. Daniel Edward Cox as a result of the juvenile court involvement. The report reflected that the defendant was poorly groomed and dressed and had body odor and numerous facial blemishes. It appeared that the defendant was unsocialized and untrained in basic hygiene. The evaluation further reflected that the defendant's judgment, insight, recent and remote memory, and abstract reasoning were all impaired and reflected moderate to severe personality disturbances. The report indicated that the defendant was reading at a beginning second grade level, although he was a seventh or eighth grader. It appeared that, at some point in time, the defendant had been placed in special education classes. It was recommended that he be placed in an adolescent treatment program. Dr. Cox reported, "[T]his is a sick youngster [who] needs extensive educational, vocational, social, emotional and personal training" and recommended that the defendant be placed at Caritas.

The defendant was placed at Caritas on March 10, 1975, and remained there for thirty days. He was released because he was not fit for the program and was returned to the Hines County Youth Court Detention Center. In April 1975, he ran away from the detention center and went to the home of Norman Smith. When Mr. Smith learned that the defendant had left the detention center, he made the defendant turn himself in to the authorities. The defendant, at this time, indicated his desire to live with Mr. Smith. A contemporaneous report surmised that the defendant's desire to live with Mr. Smith was in order to avoid going to Columbia Training School, where he was sent on May 21, 1975.

The defendant ran away from Columbia Training School on more than one occasion. After one such departure, he was returned to the center on June 24, 1975, and the following

day, a medical report revealed that the defendant had suffered a severe contusion of the right eye and jaw. A letter from Dr. Cox, dated February 15, 1976, to the chief counselor at Columbia Training School revealed Dr. Cox's opinion that he considered the defendant "brain damaged, incorrigible, antisocial, unable to respond to usual social contingency program and a loser with respect to probable adult adjustments." Dr. Cox's letter continued, "I consider this youngster to be untreatable, unmanageable and a liability to society for the rest of his natural life." Dr. Cox added, "[I]f this youngster changes for the better, it will be an act of God," and "I predict that he will be incarcerated or institutionalized on numerous occasions throughout his life." The defendant was released on parole, never having received professional help.

Shettles related that there was a class action lawsuit filed in 1977 on behalf of people housed at the Columbia Training School, based on conditions and the way the youth were being treated at that facility. In 2002, the United States Attorney General's Office conducted an investigation regarding civil rights violations at Columbia Training School. The findings of the investigation indicated that the youths were confined in unsafe living conditions and were receiving inadequate treatment and care. The investigation further indicated that the facility emphasized control and punishment rather than rehabilitation. The report by the United States Attorney General's Office reflected that "Columbia do[es] not have any system of positive incentives to manage youth. But instead rely on discipline and force. This leads to unconstitutionally abusive disciplinary practices such as hogtying, pole shackling, improper use and over use of restraints and isolation, staff assaulting youths[.]"

Shettles said that the defendant was first sent to Riverbend Maximum Security Institution in Nashville in 1992. Since his confinement at Riverbend, the defendant had continued his education and earned his GED. Prison reports indicated that the defendant had a good attitude, volunteered for additional work, and got along well with staff and other inmates. The defendant worked as a teacher's aide, was paid fifty cents an hour, and participated in life skill classes and religious activities. Shettles said that the defendant had adjusted very well to prison life and had received only one write-up since being at Riverbend. Correctional Officer Larry Carter wrote a memorandum to the defendant on March 9, 1995, stating his opinion that the defendant had a positive attitude, was a hard worker, was helpful to staff and other inmates, and was courteous. The letter also stated Officer Carter's opinion that the defendant was honest and conducted himself in a professional manner. Shettles said that there is "every indication that [the defendant] will continue to do positive things while he is incarcerated. . . . It's a very stable environment. He's had positive relationships there."

Shettles stated that the fact that the defendant had another homicide conviction would affect his ability to get parole if he were given a life sentence. In her opinion, the defendant would never get parole if he were given a life sentence. She added that the Mississippi

Department of Corrections has a detainer on the defendant for a life sentence resulting from a Mississippi murder conviction. She explained that, in the remote chance that he should be released from the custody of the Tennessee Department of Correction, the defendant would be transferred to the Mississippi Department of Corrections to serve a life sentence.

On cross-examination, Shettles stated that her firm was paid $65 per hour to perform a mitigation investigation. She surmised that she had spent 200 hours investigating the background of the defendant. Shettles confirmed that most of her information regarding the defendant's background was gathered through interviews with the defendant's family.

Shettles was questioned as to the gap in her report of the defendant's background and replied that the defendant was incarcerated at Parchman Penitentiary and the Simpson County Jail in Mississippi during that time period for the 1978 murder of Becky Roberts. Shettles explained that the defendant had assisted in an investigation at Parchman and, as a result, was transferred to the Simpson County Jail. She stated that the defendant escaped from the Simpson County Jail and remained at large until his arrest for the victim's murder. Shettles acknowledged that the defendant was convicted of robbery in the Shelby County Criminal Court on November 26, 1991. She added that, in April 1991, he was convicted of theft of property under $500.

Shettles also confirmed that, while incarcerated, the defendant had completed a correspondence course and received a certificate as a professional paralegal. She acknowledged that this contradicted earlier reports depicting the defendant as mentally deficient.

On redirect examination, Shettles explained that the defendant was seventeen years old when he was sent to Parchman Penitentiary. She stated that there was an indication in the records that he suffered a sexual assault while confined at Parchman. The defendant sought assistance from prison officials against the homosexual activity.

Dr. Joseph Angelillo, a clinical psychologist retained by the defense team to interview and perform a psychological evaluation of the defendant, testified that he met with the defendant on five occasions. Dr. Angelillo also reviewed the information gathered by Shettles and previous psychological reports, including the records of Dr. Cox. He said that he was unable to make a specific diagnosis of the defendant. He explained that there was a recommendation from Dr. Hutson in 1998 requesting that a neurological evaluation be performed. Dr. Angelillo said he had no further information regarding any neurological evaluation, saying that, absent such information, he would "have a difficult time with how much of this could be due to physical organic problems and how much of it is psychological." Dr. Angelillo said he "went with a more general diagnosis of personality

disorder."

Dr. Angelillo stated that the defendant was cooperative and that there was no evidence that he was malingering. He stated that the results of the testing indicated most strongly toward schizoid personality features, which "is a tendency to want to do things alone." He continued:

> Many times these individuals have social skills that aren't, perhaps, up to par. They may prefer to do things alone because they may have been hurt in the past. They may not find joy, the type of joy that maybe others find in performing or doing things that are typically found enjoyable. They may withdraw from relationships unless they have absolute assurance that they're going to be accepted.

He later explained that schizoid features include "a limited range of emotional expression," inability to read nonverbal communication, inability to "get the range of enjoyment" that other people might have from the same experience, a desire to be alone, withdrawal from others, and fear of relationships.

Dr. Angelillo opined that the defendant's thirty-day stay at Caritas was insufficient and that his mental health care as an adolescent was lacking. Dr. Angelillo stated that "what [the defendant] was convicted of doing was a function of the person he became." In this regard, Dr. Angelillo stated that he believed that the rejection the defendant experienced in his early life and the sexual and physical abuse inflicted upon the defendant as a child most probably influenced the person the defendant became.

Dr. Angelillo observed that the defendant's confinement at Riverbend had "behaviorally defined, as far as his ability . . . to engage in constructive activities." He stated there was no indication that the defendant would not continue to thrive in prison.

Dorothy Rowell, the defendant's aunt, testified that her mother had reached out to the defendant's biological parents and arranged the adoption of the Smith children. Rowell's brother, Jimmy Odom, Sr., adopted the defendant; her sister adopted Cathy; and her parents adopted Carol. Rowell explained that, prior to the adoption, the Smith children spent long periods of time at the daycare center. She stated that the children did not know who their mother or father was and "would grab any man or woman that come through and call them momma."

Rowell, who was thirteen at the time of the adoption, recalled that, prior to going to

live with her brother, the defendant "looked as if he had been abused." She recalled observing cigarette burns on the defendant's arms and what were said to have been vent burns from a floor furnace on his feet. Rowell described the defendant as "[v]ery sweet. Very loving. Always smiling. Happy. Very precious little boy." She explained that the defendant's demeanor changed after Jimmy and Shirley Odom's divorce.

Rowell explained that Gladys McClendon was Shirley Odom's mother and said that the children stayed with McClendon "a lot" after the divorce. McClendon was abusive toward the defendant and never accepted him as part of her family. Rowell stated that Shirley Odom later married Marvin Bruce who was "[n]ot a very nice – to put it mildly, not a very nice person" and was abusive to the defendant, ridiculing him over bedwetting. Rowell said she had heard that Mr. Bruce abused Larry and Cindy Odom as well. The defendant had complained to Rowell's mother that Mr. Bruce had "[p]ull[ed] on his private parts" when he and Larry Odom were taking a bath.

Rowell said that, when the defendant was a teenager, he helped her mother care for Charles Lee Odom, who had lost both legs to gangrene. She said that the defendant was "very, very good with Charles Lee." Rowell said that the defendant had mental problems and had been physically, sexually, and emotionally abused as a child but never received any help for these problems.

Cynthia Martin, the defendant's adopted sister, testified that she was seven when her parents adopted the defendant and described the burns on the bottoms of the defendant's feet when he first came to live with them. She said that the defendant's biological father, Norman Smith, visited her grandmother's home, but the defendant did not have any contact with Mr. Smith until he was older. She stated that, prior to her mother's marriage to Marvin Bruce, the defendant was "[t]he sweetest person you would ever want to meet. He was just a sweet child. He was helpful. He was kind. He could have went along [sic] way in life." She described Mr. Bruce as "terrible" and said that he "loved to spank." She said her mother did nothing to stop the spankings. Martin stated that her grandmother, Gladys McClendon, never accepted the defendant and was cruel to him. She said that McClendon beat the defendant with "[w]hatever she could find," including belts and belt buckles.

Jimmy Odom, the defendant's brother, confirmed previous accounts that the defendant was covered in burn marks when he first came to live at their home. He said that their parents divorced three or four years after they adopted the defendant. He said the defendant was treated well when their father was present but "[n]ot good at all" after their father left the home. He reiterated the testimony that their maternal grandmother, Gladys McClendon, treated the defendant badly, beating him with "belts and stuff." He related that the defendant was not treated like a child or even like a member of the family.

Jimmy Odom said that things did not improve after their mother married Marvin Bruce who made the defendant eat last at the dinner table. Jimmy Odom described Mr. Bruce as "a pervert. Just a sorry person." He said that Mr. Bruce and his family ridiculed the defendant, calling him "stupid and retarded." Jimmy Odom stated that there was "no doubt" that Mr. Bruce physically abused the defendant.

Jimmy Odom stated that he, like the defendant, was sent to Columbia Training School, saying that the schooling, itself, was only an hour and a half a day. He explained that those confined there spent forty-five minutes reading and forty-five minutes doing math. The rest of the time was spent in the fields, "from baling hay to picking corn, to cutting sugar cane, to making syrup, to picking peas, slapping the hogs, milking the cows, just whatever what was called for." He described the discipline at Columbia Training School as "whup[ped] . . . with a board" and said he had been "whupped until just nothing but the band of [his] underwear [was] left." He also told of an isolation cell where children were placed alone in their underclothes.

Jimmy Odom stated that the defendant did not return to the Bruce home after his release from Columbia Training School. Instead, he slept in people's backyards and in little clubhouses because "he had nowhere to go." Jimmy Odom testified that Charles Lee Odom was a drug addict, that his drug use caused him to lose his legs from gangrene, and that the defendant ended up taking care of him.

Jimmy Odom stated that he was incarcerated at Parchman Penitentiary, which he described as a "real bad prison," for burglary and larceny convictions. He said that he, his brother, Larry, and the defendant were all in Parchman at the same time and that Larry and the defendant were sexually abused. He explained that inmates took "the weak ones, the young ones, and ma[d]e them their bitches." Jimmy Odom learned of what was happening to his brothers and got into fights, explaining, "[T]here would be guys . . . they would tell me what they had done to Larry and [the defendant] . . . and then I would have to do what I had to do . . . . I had my teeth knocked out and my head busted open. I was stabbed up there. . . . [Y]ou had to hold up for your blood up there, man."

Jimmy Odom stated that the defendant was a good child and "just got pushed aside and pushed away so much." The defendant was never given any help. Jimmy Odom said, "There wasn't no love in our family. We . . . wasn't no family." He reflected that the defendant "never had a chance."

Timothy Terry, the inmate records manager at Riverbend, testified that, in his opinion, the defendant would never be moved to a local county jail to serve his sentence should the

jury impose a sentence of life. He also confirmed that the State of Mississippi had a detainer on the defendant. Thus, in the event that the defendant was ever paroled by the State of Tennessee, he would be returned to Mississippi to serve a life sentence there.

Celeste Wray testified that she was involved in prison ministries, describing her function as "an alternative Ministry because we don't try to proselytize or talk anybody into anything. We simply go to be a friend and to encourage them to do their time the best they can." Wray stated that she visited approximately twenty federal prisoners monthly and other prisoners sporadically.

Wray said she received a letter from the defendant extending the hand of friendship, and they established a regular correspondence. She said she had received hundreds of letters from the defendant and had visited him once. She described their correspondence as pleasurable and enjoyable. Wray stated that the defendant "writes a very interesting letter. He's intelligent and articulate and always very respectful[]." Wray said that she had been told that the defendant had adjusted well to prison life.

Ricky Harville, a correctional GED teacher at Riverbend, said that the defendant was a teacher's aide and was "very helpful" to him. Harville said that the defendant had a positive approach to his job and assisted other inmates with reading, writing, and legal work in his free time. He opined that the defendant's life had value in the penitentiary setting.

Gordon Janaway, a retired correctional GED teacher at Riverbend, testified that he retired in 2003 and that the defendant was a student in his GED class. He described the defendant as enthusiastic about earning his GED and, after doing so, the defendant returned to the classroom as an assistant. Janaway stated that the defendant was always respectful and willing to do what was required, and he believed that the defendant would continue to help people in prison to the best of his ability.

Jim Boyd testified that he began volunteering in the prison system in 1988. In 2000, the warden at Riverbend asked him to expand his program, "Learning to Live." He explained that the program taught learning skills and focused on changing an inmate's way of thinking. He said that, during a typical session, he gives the inmates a living problem which they discuss. Boyd said that the defendant was a very vocal and active participant in his class and was always respectful.

Helen Cox testified that she had been involved in prison ministries since 1963. She visited the defendant at Riverbend and said he had participated in the Learning to Live class. She described the beautiful models of ships that the defendant had made and said she received his testimonial when he became a Christian. Cox recalled the first time she met the

defendant. She said her initial opinion was that the defendant "was hard and . . . looked like a criminal," but she was wrong "[b]ecause he's very warm." She explained that the defendant had grown as a human being and that he ministered to other inmates. She stated that she was not afraid of the defendant and described him as "just a great guy."

At the close of the proof, the jury was instructed on the following statutory aggravating circumstances:

> One, the defendant was previously convicted of one or more felonies other than the present charge[,] the statutory elements of which involve the use of violence to the person.
>
> The State is relying upon the crime of murder, the statutory elements of which involve the use of violence to the person.
>
> Two, the murder was committed while the defendant was engaged in committing or was an accomplice in the commission of or was attempting to commit or was fleeing after committing or attempting to commit any robbery.
>
> For you to find the defendant committed a robbery, the State must have proven beyond a reasonable doubt the existence of the following essential elements:
>
> > One, that the defendant knowingly obtained or exercised control over property owned by [the victim].
> >
> > And two, that the defendant . . . didn't have the owner's effective consent.
> >
> > And three, that the defendant intended to deprive the owner of the property.
> >
> > And four, that the defendant took such property from her by the use of violence or by putting her in fear.
> >
> > And five, that the defendant took such property intentionally or knowingly.

See, generally, Tenn. Code Ann. § 39-13-204(i)(2), (5) (1991). The jury was also instructed that it should consider any mitigating circumstances supported by the proof, specifically:

Mitigating circumstances. Tennessee law provides that in arriving at the punishment, the jury shall consider as previously indicated any mitigating circumstances raised by the evidence which shall include but aren't limited to the following:

> His childhood history.
>
> His adult history prior to the crime.
>
> Treatment or lack of treatment of any mental health problems.
>
> Any attempts or lack of attempts made at treatment and rehabilitation.
>
> His juvenile institutional environment.
>
> His history, achievements, adaptability and record while in prison.
>
> Any trauma suffered by him in prison.
>
> His talents[,] abilities and potential.
>
> The likelihood or unlikelihood of his ever being released on parole.
>
> His favorable relationships with others.
>
> His unfavorable relationships with others.
>
> The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect which was insufficient to establish a defense to the crime, but which substantially affected his judgment.
>
> Any other mitigating factor which is raised by the evidence

produced by either the prosecution or defense at either the guilt or sentencing hearing.

That is, you shall consider any aspect of the defendant's character or record or any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence.

Following submission of the instructions, the jury retired to consider its verdict.[3] After deliberations, the jury found that the State had proven the aggravating circumstances beyond a reasonable doubt, i.e., that the defendant had been previously convicted of one or more felonies other than the present charge, the statutory elements of which involved the use of violence to the person, and that the murder was committed while the defendant was engaged in committing or was an accomplice in the commission of or was attempting to commit or was fleeing after committing or attempting to commit any robbery. The jury further found that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. In accordance with its verdict, the jury sentenced the defendant to death for the victim's murder.

ANALYSIS

The defendant has raised seven issues on appeal.

I. Trial Court Erred in Granting Challenge for Cause

The defendant argues that his rights to an impartial jury, as secured by the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 8, 9, and 16 of the Tennessee Constitution, were violated when the trial court excused a prospective juror because of her beliefs about the death penalty. The defendant asserts, and we agree, that although this issue was not preserved in the motion for new trial, this court must consider the error if brought to its attention pursuant to Tennessee Code Annotated section 39-13-206. See State v. Rimmer, 250 S.W.3d 12, 32 (Tenn. 2008); State v. Bigbee, 885 S.W.2d 797, 805 (Tenn. 1994).

A criminal defendant is guaranteed the right to an impartial jury by both the United States and Tennessee Constitutions. See U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In this regard, parties in both criminal and civil cases are granted "an absolute right to examine prospective jurors" in an effort to determine that they are competent. State v. Kiser, 284

[3]The jury retired to begin deliberations at 9:23 a.m. At 7:25 p.m., the jury returned to the courtroom to deliver its verdict.

S.W.3d 227, 279 (Tenn.) (citing Tenn. Code Ann. § 22-3-101), cert. denied, __ U.S. __, 130 S. Ct. 229 (2009). In determining when a prospective juror may be excused for cause regarding views as to the death penalty, the standard is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath,'" but "this standard likewise does not require that a juror's bias be proved with 'unmistakable clarity.'" Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 852 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45, 100 S. Ct. 2521, 2526 (1980)). However, before excusing the prospective juror, the trial judge must have the "definite impression" that a juror could not follow the law. State v. Austin, 87 S.W.3d 447, 473 (Tenn. 2002). The trial court's finding of bias of a juror because of his or her views concerning the death penalty are accorded a presumption of correctness, and the defendant must establish by convincing evidence that the trial court's determination was erroneous before an appellate court will overturn that decision. State v. Thomas, 158 S.W.3d 361, 378 (Tenn. 2005); Austin, 87 S.W.3d at 473.

During voir dire, inquiry was made of a prospective juror regarding her answers on the juror questionnaire. In this regard, the following colloquy occurred, from which the trial court concluded that she was not qualified to sit on the jury:

> [THE STATE]: [Y]ou mentioned in your questionnaire that you could not consider both forms of punishment in a case like this. Is that right?
>
> THE JUROR: Yes.
>
> [THE STATE]: And what's the basis –
>
> . . . .
>
> [THE STATE]: And you indicated that you would not be open to both sentences in a . . . murder first degree case.
>
> THE JUROR: Yes.
>
> [THE STATE]: What I was asking you is what[] is the basis of your feeling on this, is it religious or personal or ethical or all of the above or just where did you come by your feelings about that?
>
> THE JUROR: Well, I feel it because – me, myself, as a person, I don't really have a right to judge somebody for what they've done. I wasn't there when it happened. I'm not saying that it didn't happen or I just – I feel strongly about

that.

. . . .

[THE STATE]: What we're here today for is to ask you what is your honestly held belief and see whether or not under those circumstances you would be appropriate as a juror for this type of case. That's what we're here for. We're not here to judge your feelings or anything about that either.

. . . .

Can you think of any circumstance under which – that you could vote for the death penalty and sign your name as one of the people to it imposing a death penalty on an individual.

THE JUROR: No.

. . . .

[THE STATE]: [E]ven if I could describe for you just the most horrible, horrible case that you could think of, is it that your feeling against the death penalty is so strong, not against the person being punished in some way, but your feeling against the death penalty is so strong that you could never consider imposing it in a criminal case?

THE JUROR: Well, . . . I guess it all depends on, you know, when it comes to children, and you know, I'm for it, I mean, like innocent little children, then I am for it. But like I said, I don't really just know what happened back then in '91, so I really can't–

[THE STATE]: . . . Now, are you telling me that there are some circumstances where you could be open to the possibility of the death penalty, and perhaps sign your name as a person saying this person should have the death penalty[?]

THE JUROR: Right. Like I said, it all depends on you know the situation, what really, you know.

[THE STATE]: . . . [D]o you think that you would then have a right to make that judgment in a case where it was children but maybe you wouldn't have a right to make that case where it was adults that were killed?

THE JUROR: I guess, children are like – I'm not saying that this adult wasn't innocent or anything, but children are more innocent, to me. That's just how I feel about it, you know.

[THE STATE]: . . . The question is, though, the law doesn't say the death penalty is appropriate just for children. . . . . [I]f the State proves for you one or more of those aggravating circumstances and you weigh it and you find that it outweighs any mitigation . . . beyond a reasonable doubt, could you vote and sign your name as one of those people to, you know, vote for the death penalty?

THE JUROR: No, I can't. No.

. . . .

[THE STATE]: . . . If it was a horrible, horrible, case against a child could you perhaps sign your name and say this is, perhaps, a death penalty case?

THE JUROR: Well, no, I really can't. I can't.

. . . .

[DEFENSE COUNSEL]: Now, in some cases, I think you're like lots of people, in some cases, you would say, well, I just can't see the death penalty being appropriate in that case. But . . . if it does involve a child or the rape of a child or torture of a person, then maybe you would consider it. Is that kind of where you're coming from on this?

THE JUROR: Yeah.

. . . .

[DEFENSE COUNSEL]: Could you consider, sit and consider whether the State has brought enough proof beyond a reasonable doubt before you would ever look or consider the death penalty?

THE JUROR: No.

[DEFENSE COUNSEL]: You could not consider it in that case. Tell me what you mean . . .

THE JUROR: Okay. What I mean, I couldn't consider the death penalty for him if they, like you said, if they hadn't brought enough evidence.

[DEFENSE COUNSEL]: Okay. So if they didn't bring enough proof, you couldn't even consider the death penalty?

THE JUROR: No.

. . . .

THE JUROR: I just don't like judging, I just, no. I just –

[DEFENSE COUNSEL]: . . . [B]ut if you were called upon to follow that duty by the law, can you do that?

THE JUROR: I would have to. I have no choice.

[DEFENSE COUNSEL]: . . . And before you consider a death penalty, would you hold the State to their burden and make them bring enough proof to prove an aggravating circumstance to you beyond a reasonable doubt?

THE JUROR: If I have to, yes. If I have to I will.

[DEFENSE COUNSEL]: . . . So you could follow that law?

THE JUROR: Yes.

. . . .

THE COURT: . . . If the State proved aggravating circumstances beyond a reasonable doubt and they proved that those aggravating circumstances outweighed any mitigation, are you telling me that you would vote for death?

You're shaking your head no, but I'm not sure –

. . . .

THE JUROR: If they brought enough evidence, I wouldn't have no choice.

. . . .

> THE COURT: . . . My question is you can follow the law and do that? . . . So you're the only one that can tell us if you are a juror in this case, and I gave you that oath, and you swore to follow it, the question is, could you sign a verdict of death in a proper case, if the State proved aggravating circumstances beyond a reasonable doubt. And you're the only person that can tell me that.
>
> THE JUROR: I just – I can't – I just . . . . I don't – I just don't feel right signing somebody's death.

Based upon the juror's responses to questioning, the trial court excused her as a prospective juror in the defendant's case. The defense objected, and the trial court explained the basis for the ruling:

> She said that she would have to follow the law is what she said. . . . And obviously she would if she took the oath. But the problem is I'm not going to give her the oath if she tells me that she can't sign a death verdict.
>
> I find from what she said and her shaking her head no and everything else that her views whether right or wrong would substantially impair her function as a juror.
>
> So I'm going to excuse her and I understand your objection.

The defendant argues that the trial court erred in excusing the juror for cause. He argues that her affirmation that she favored the death penalty in some circumstances, specifically where the victims were children, and her responses that she could follow the law and sign the verdict form if selected as a juror because she "would have to" made it clear that excusing her for cause was error. See Gray v. Mississippi, 481 U.S. 648, 659-61, 107 S. Ct. 2045 (1987) (improper excusal of prospective juror for cause based on view on capital punishment requires death sentence be vacated).

Despite some inconsistencies as to her ability to follow the law regarding the death penalty, the juror's overall responses indicated her unwillingness to judge others and to return a verdict of death. In excusing her for cause, the trial court observed and noted the juror's physical responses to questioning as well as the fact that she did not equivocate regarding her answers that she was unable to sign a death verdict. The defendant has failed to satisfy his burden of establishing by convincing evidence that the trial court erred in excusing the prospective juror for cause. The trial court had sufficient reason to believe that the juror's views about the death penalty would "prevent or substantially" impair her performance as a juror. We conclude that the trial court did not err in excusing the

prospective juror. The defendant is not entitled to relief as to this issue.

II. Admission of Crime Scene Photographs

On appeal, the defendant argues that the trial court erred in admitting into evidence two crime scene photographs and that this error, coupled with prosecutorial misconduct during closing arguments, violated his statutory and constitutional rights. We will review this argument.

As we have set out, in the defendant's second resentencing hearing, the jury found the presence of one aggravating circumstance, that he previously had been convicted of one or more violent felonies. Tenn. Code Ann. § 39-13-204(i)(2). The same photographs of which the defendant now complains were determined by our supreme court to have been admissible in that proceeding.

At the third resentencing hearing, the jury found the presence of two aggravating circumstances, that the defendant previously had been convicted of a violent felony and that the murder was committed during an attempt to commit a robbery. See Tenn. Code Ann. § 39-13-204(i)(2), (7). The defendant again argues that the trial court erred in admitting these photographs into evidence and couples this claim with the argument that this error was compounded by the fact that the State committed prosecutorial misconduct during closing arguments by arguing for nonstatutory aggravating circumstances. As we will explain, we respectfully disagree with the defendant's analysis.

In response to the defendant's argument to the trial court regarding admission of these photographs, the court noted that admission of the photographs previously was held proper by our supreme court, which concluded that they were relevant and not unduly prejudicial:

> At a re-sentencing hearing, both the State and the defendant are entitled to offer evidence relating to the circumstances of the crime. State v. Teague, 680 S.W.2d 785, 787-88 (Tenn. 1984). A trial court is afforded broad discretion in determining whether to admit photographs of the deceased in a murder prosecution. See State v. Morris, 24 S.W.3d 788, 810-11 (appendix) (Tenn. 2000). The decision to admit photographs will be reversed only if the trial court has abused its discretion. State v. Vann, 976 S.W.2d 93, 103 (Tenn. 1998).
>
> At the time of this offense, Tennessee Code Annotated section 39-13-204(c) stated in part that evidence may be presented in a capital sentencing proceeding as to "any matter that the court deems relevant to the punishment

> and may include, but not be limited to, the nature and circumstances of the crime. . . ." The statute further provided that "[a]ny such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence. . . ." Id.
>
> In applying these principles, we agree with the Court of Criminal Appeals that the trial court did not abuse its discretion in admitting the two photographs of Johnson. The first photograph, which was three-by-five inches in size, showed the victim in the back seat floorboard of her car and the multiple stab wounds and bleeding she suffered. The second photograph, which was also three-by-five inches in size, showed the victim on the floorboard with her head facing the rear of the car and a rolled up check in her hand. In sum, the photographs were relevant for the prosecution to show the "nature and circumstances" of the crime, i.e., the position of the victim's body, the location of the offense, the defendant's actions, and the injuries suffered by the victim. Moreover, the photographs were not unfairly prejudicial to the defendant.

Odom, 137 S.W.3d at 587-88. The trial court applied this previous ruling as the "law of the case" doctrine in concluding that the photographs were admissible.

The "law of the case" doctrine applies to issues that were actually before the appellate court in the appeal and to issues that were necessarily decided by implication. See State v. Jefferson, 31 S.W.3d 558, 560-61 (Tenn. 2000) (citing Memphis Publ'g Co. v. Tennessee Petroleum Underground Storage Tank Bd., 975 S.W.2d 303, 306 (Tenn. 1998)). When an initial appeal results in a remand to the trial court, the decision of the appellate court establishes the law of the case which generally must be followed upon remand by the trial court, and by an appellate court if a second appeal is taken from the judgment of the trial court after remand. Id. The "law of the case" doctrine prohibits reconsideration of issues that have already been decided in a prior appeal of the same case. Id. However, an issue decided in a prior appeal may be reconsidered if: (1) the evidence offered at the hearing on remand was substantially different from the evidence at the first proceeding; (2) the prior ruling was clearly erroneous and would result in a manifest injustice if allowed to stand; or (3) the prior decision is contrary to a change in the controlling law occurring between the first and second appeal. See id. The State asserts that none of the exceptions applies to bar use of the "law of the case" doctrine. We agree and, thus, conclude that the trial court properly applied the "law of the case" doctrine in admitting Exhibits 5 and 6 depicting the victim's body.

We note that, in his brief, the defendant argues that, as to the application of the "law

of the case" doctrine, the determination by our supreme court in Odom, 137 S.W.3d at 588, that the photographs were relevant to show the "nature and circumstances" of the crime would "seem to be in conflict with the rule in State v. Teague, 897 S.W.2d 248, 251 (Tenn. 1995), that evidence about the circumstances of the crime be 'carefully limit[ed] . . . to the essential background.'" As an intermediate appellate court, we are bound by the decisions of our supreme court and without authority to consider whether these decisions are in conflict, as the defendant asserts.

The defendant previously was convicted of first degree murder and sentenced to death. Because this was only the resentencing phase where the defendant's guilt was not at issue, the jury was without benefit of the proof normally introduced during the guilt phase hearing relating to the circumstances of the offense. The admissibility of evidence at the resentencing hearing is governed primarily by Tennessee Code Annotated section 39-13-204(c) which provides:

> [E]vidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i); and any evidence tending to establish or rebut any mitigating factors. Any such evidence that the court deems to have probative value on the issue of punishment may be received, regardless of its admissibility under the rules of evidence; provided, that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection (c) shall not be construed to authorize the introduction of any evidence secured in violation of the constitution of the United States or the constitution of Tennessee.

Our supreme court has concluded that, although the proof at a resentencing trial need not be as detailed as that offered at a guilt-innocence phase, some proof is essential to ensure both individualized sentencing by the jury and effective comparative proportionality review by the appellate courts. See State v. Nichols, 877 S.W.2d 722, 731 (Tenn. 1994) (rejecting a defendant's claim that proof regarding the circumstances of the offense is not admissible at resentencing hearings and holding that such proof is necessary to provide individualized sentencing); Odom, 928 S.W.2d at 31. Moreover, the purpose for introducing photographs into evidence is to assist the trier of fact. As a general rule, the introduction of photographs helps the triers of fact see for themselves what is depicted in the photographs. State v. Griffis, 964 S.W.2d 577, 594 (Tenn. Crim. App. 1997). Where the jury is without the benefit of the factual background established by the proof during the guilt phase, the parties are "entitled to offer evidence relating to the circumstances of the crime so that the

sentencing jury will have essential background information 'to ensure that the jury acts from a base of knowledge in sentencing the defendant.'" State v. Carter, 114 S.W.3d 895, 903 (Tenn. 2003) (quoting State v. Adkins, 725 S.W.2d 660, 663 (Tenn. 1987)). The photographs in exhibits 5 and 6 show the position of the victim's body where the homicide occurred and help explain the circumstances surrounding the offense. Their admission was appropriate under the criteria set out by the court in State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978).

In an ancillary argument to this challenge, the defendant asserts that the admission of the photographs was improper when considered in conjunction with comments made by the prosecution during closing argument, arguing that, used together, this was an improper attempt to urge the jury to weigh nonstatutory aggravating circumstances, i.e., the victim's age and vulnerability. We will review this claim.

During closing argument, the prosecution made the following remarks:

> [PROSECUTOR 1]: She probably got a little nervous, all one hundred and five pounds of her when he barged into the front seat of her car with his knife and demanded money.
>
> . . . .
>
> In her frail little dead hand, she's clutching one of her checks. . . . He's lurking around in the parking garage trying to find the perfect victim. And he found her. All one hundred and five pounds of her.
>
> . . . .
>
> But that wasn't enough. He wanted more. He pushed her into the back seat, all one hundred and five pounds of her, and he raped her. Anally.
>
> And then he stabbed her two more times just to make sure she was good and dead, because he [had] killed before and look how easy it was to walk away.
>
> I built up the trust of all those suckers in Parchman and they transported me to the Simpson County Jail.
>
> This is a joke. I'm not going back without a struggle and poor little hundred and five pounds of Mina Ethel Johnson, she couldn't put up much of

a struggle.

. . . .

I will submit to you, you will never block out some of the images that you had forced upon you this week.

The naked picture of [the victim] in the backseat of her car where the police found her. I can't bring myself to put it on the screen again.

Look at it in the back. Look at it in the back. See what it tells you.

. . . .

[PROSECUTOR 2]: Nothing in his background caused him to hunt down a seventy-seven year old woman and forcibly rape her.

The defendant failed to make a contemporaneous objection as to either of these statements.

When a prosecutor's statement is not the subject of a contemporaneous objection, the issue is waived. Tenn. R. Crim. P. 33; Tenn. R. App. P. 36(a); State v. Thornton, 10 S.W.3d 229, 234 (Tenn. Crim. App. 1999); State v. Green, 947 S.W.2d 186, 188 (Tenn. Crim. App. 1997); State v. Little, 854 S.W.2d 643, 651 (Tenn. Crim. App. 1992). If this court is to review the claims of prosecutorial misconduct, we must do so through the process of "plain error" review. At the time of the defendant's trial, Tennessee Rule of Criminal Procedure 52(b) provided: "An error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice."

This court has long recognized that closing arguments are a valuable privilege that should not be unduly restricted. See State v. Sutton, 562 S.W.2d 820, 823 (Tenn. 1978) (citing Smith v. State, 527 S.W.2d 737 (Tenn. 1975)). Consequently, attorneys are given greater leeway in arguing their positions before the jury, and the trial court has significant discretion in controlling these arguments, to be reversed only upon a showing of an abuse of that discretion. Id. In a capital sentencing hearing, evidence may be presented tending to establish or rebut any statutory aggravating circumstances or mitigating circumstances. Moreover, a jury must be permitted to consider evidence pertaining to the nature and circumstances of the crime even if the proof is not necessarily related to a statutory aggravating circumstance. State v. Nesbit, 978 S.W.2d 872, 890 (Tenn. 1998). However, the State may not rely upon *nonstatutory aggravating circumstances* in seeking the

imposition of the death penalty. See id.; see also State v. Thompson, 768 S.W.2d 239, 251 (Tenn. 1989).

In determining whether death is the appropriate punishment for the offense and for the individual defendant, the jury is free to consider "a myriad of factors" relevant to punishment, that is, relevant to establishing and assigning weight to aggravating and mitigating circumstances. Nesbit, 978 S.W.2d at 890. This "myriad of factors" serves to individualize the sentence imposed on each defendant to ensure that the sentence is just and appropriate considering the characteristics of the defendant and the circumstances of the crime. See Zant v. Stephens, 462 U.S. 862, 875, 879, 103 S. Ct. 2733, 2741, 2744 (1983). Evidence appropriate for the jury's consideration can include the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances; and any evidence tending to establish or rebut any mitigating factors. Tenn. Code Ann. § 39-13-204(c).

We respectfully disagree that, in making these arguments, the State "essentially created a new aggravating circumstance called 'circumstances of the offense' which consisted of any pejorative aspect of the crime or the defendant that the prosecution could think of incorporating, and . . . urged the jury '[t]o weigh it. . . . To decide what the punishment for the murder of Mina Ethel Johnson should be.'" First, as we have set out, our supreme court has previously determined that the photographs were admissible to show the circumstances of the crime. In closing arguments, the prosecutors were drawing attention to what was depicted in the two photographs. To conclude that such arguments were an attempt to create a new aggravating circumstance would be an undue restriction upon closing arguments. Accordingly, we conclude that this argument is without merit.

III. Propriety of Parole Instruction

The defendant argues that the trial court erred in instructing the jury that he would be eligible for parole after serving twenty-five years of a life sentence. He contends that this instruction created a "false choice" and violated his right to due process of law and heightened reliability under Article I, Sections 8 and 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments to the United States Constitution. Specifically, he complains that, at the time of the resentencing hearing, he had already been incarcerated for seventeen years, and the instruction created a "false choice" in that a "life sentence" to this sentencing jury potentially meant that he would only serve eight more years before becoming parole eligible. He complains that this *de facto* instruction that he would be eligible for parole in eight years eliminated a reasonable alternative to the death penalty.

We will set out the manner in which parole eligibility for a life sentence became an

issue in this matter.

A. Voir Dire Examination

Counsel for the defendant in the present appeal informed the prospective venire that "[a] defendant who received a sentence of imprisonment for life shall not be eligible for parole consideration until the defendant has served at least twenty-five calendar years." Counsel then posed the following question:

> Is there anybody who feels – and it's okay if you do. There are people in this world that think if somebody is convicted of murder, they should never have a chance to get out of prison, and that's okay if that's what they believe.
>
> The question is if a person believes that, can they put that belief aside and decide this case. . . .
>
> . . . .
>
> Does it give anybody any pause? That they either don't agree with that law or they would have a hard time voting a life sentence and it would affect their ability because they believe that someday the person may be released?

An unidentified juror responded by asking, "Does that include also the time the person has already served?" To this, the court responded:

> Well, let me say this, the law requires that you be told what a life sentence is. And the law also says we can't go into rules and the state penitentiary or parole board regulations or who gets – we can't start into that because you're supposed to choose between the two sentences.
>
> And the law requires that you be told that life doesn't mean life without ever being paroled.
>
> But other than that, the law does not allow the judge or anyone else to talk about that in the trial.

Another prospective juror asked, "But is the twenty-five year sentence strictly for this most recent murder? And . . . is the time served included in this[?]" To this, the court responded:

> Okay. Here again, all this other stuff are for other branches of

government to decide. All the law allows me to tell you is this. Is that for the murder conviction that he has received, murder in the perpetration of rape in 1992, he must serve on that crime twenty-five, 365 day a year days – I mean years, before he would be eligible to ask for parole.

Obviously we can't get into any other kind of stuff because that's not relevant to this trial that we're trying.

Whether or not he gets parole is not an aggravating circumstance and you cannot consider that in deciding whether or not he should be sentenced to death.

The reason that I'm giving you that information is because there's a law in the lawbook that says, judge, you must put this in the charge. But that's the only reason I'm giving it to you. I'm not giving it to you because it's relevant to an aggravating circumstance.

B. Juror Questions During Hearing

After reviewing the mitigation exhibits, the jury submitted a question regarding "mandatory parole vs. parole, please define in layman's terms." The court responded:

I don't think they need to consider the parole matter unless the defense wants that defined. I can tell them they are not to consider that. I've already told them that. It's not an aggravating circumstance.

T.C.A. 40-28-116 is a code section. I can tell them they're not to consider that.

Let's see what it is. 40-28-116 is –

. . . .

Power to parole. I don't think we need to get into that. I can tell them that is the statute on parole which is not – parole procedures which is not relevant.

Discourse between the court and the attorneys for both the defendant and the State continued. The trial court then provided the jury with the following answer to its question:

The last two are TCA 40-28-116 and mandatory parole vs. parole, please define in layman's terms.

Now, I will say this about that. You are not to consider parole as an aggravating circumstance. We've talked and I've allowed both sides to get into this.

On jury selection the defense brought up that they wanted to make sure that you . . . would not consider this as an aggravating circumstance, that it would be legally possible for a defendant to get parole after twenty-five calendar years.

It has nothing to do with an aggravating circumstance. We don't want you back there thinking, well, let's consider as another aggravating circumstance, this guy might be paroled, because you cannot do that.

You cannot consider at all for any purpose whatsoever the laws might change. Because if they did, they would not apply to this defendant because the law at the time of the crime would be the law that applied to this defendant.

And also, quote, the laws might change, would apply to any defendant in the world for eternity and decisions. And the law . . . doesn't allow us to consider anything but the aggravating circumstances and then weighing the mitigation as to this particular defendant in this particular case.

So you can't consider something like, well, the laws might change. I mean, we could say, well, for all we know, this afternoon the legislature might make – do away with all criminal crime. There would be no more crime, no more punishment, no more courts.

But those are the kinds of things that we can't consider. You can consider the law that I give you, which will not change for this particular case, and you can consider the evidence in the courtroom, but we can't talk about, suppose aliens from outer space fly down here and do this or that and destroy the jail that the defendant is housed in.

We can't consider those kind of things. So, with that, though, the defense has a right to show as mitigation that the defendant may serve a life sentence – he will be serving a life sentence, but may never be released on parole. They have a right to put on that proof.

But I do not want you to ever consider that that's an aggravating circumstance.

If you decide the sentence of death is the appropriate punishment, and I'm not saying you should, but if you do, you should not decide that because you don't want the defendant to ever be released from prison, because that is absolutely illegal and wrong for you to do. Does everybody understand that?

Now, if a mitigator is put on, a mitigating circumstance, and you want to give it weight that the defendant may never get out of prison, you may weigh that as mitigation against the two aggravating circumstances, and any proof put on in this case that he might possibly be on parole, I don't think there will be any proof, but if there were, that would weigh against that mitigator, but never under any circumstances should the defendant's ability to be on parole be an aggravating circumstance. . . .

. . . .

. . . With that, I will tell you that TCA 40-28-116 is the statute on parole powers and mandatory parole vs. parole, please define in layman's terms, that may be defined for you. A witness may be recalled to define that. They may not. . . .

But I'm not going to get into parole because parole is not a proper topic as an aggravating circumstance.

The fact of a defendant's never being able to make parole or not being likely to make parole for this particular defendant in this particular case can be considered by you as a mitigating circumstance.

C. Jury Instruction

The trial court provided the following instruction to the jury:

Tennessee law provides that a person convicted of murder in the perpetration of rape shall be punished by death or by imprisonment for life.

A defendant who receives a sentence of imprisonment for life shall not be eligible for parole consideration until the defendant has served at least twenty-five full calendar years of such sentence.

The United States Supreme Court has held that the Federal Constitution neither requires nor prohibits instructions to capital sentencing juries on the possibility of commutation, pardon, or parole. State v. Dellinger, 79 S.W.3d 458, 474 (Tenn. 2002) (citing California v. Ramos, 463 U.S. 992, 1013-14, 103 S. Ct. 3446 (1983)). Our legislature has determined that an instruction advising the jury of the minimum term of confinement in a sentence of life is required at the penalty phase of a capital murder trial. Specifically, Tennessee Code Annotated section 39-13-204(e)(2) provides in part: "The jury shall be instructed that a defendant who receives a sentence of imprisonment for life shall not be eligible for parole consideration until the defendant has served at least twenty-five (25) full calendar years of the sentence." The trial court instructed the jury in accordance with the dictates of our legislature. We note, however, that this requirement was only added with the adoption of a third option for punishment in capital cases, life without the possibility of parole. Prior to the adoption of the life without parole sentencing option in 1993, there was no requirement that the trial court instruct the jury as to the minimum term of confinement of a life sentence before becoming parole eligible.

It is arguable as to whether the trial court was required to provide such instruction as the only sentences available to the defendant were a sentence of life and a sentence of death.[4] In State v. Stephenson, 195 S.W.3d 574, 605 (Tenn. 2006) (appendix), our supreme court affirmed this court's holding that the trial court did not err by refusing to provide the instruction set forth in Tennessee Code Annotated section 39-13-204(e)(2). The defendant in Stephenson complained that the trial court erred in refusing to provide the jury with the instruction as to the minimum years of confinement before becoming eligible for parole. Because Stephenson's crime was committed in 1989, his only available sentencing options were life imprisonment and death. Stephenson, 195 S.W.3d at 605. This court reasoned that "[b]ecause the offense in this case was committed before the effective date of the amended statute, the trial court did not err in declining to instruct the jury regarding eligibility for parole under Tennessee Code Annotated section 39-13-204(e)(2)." Id. This court, relying upon State v. Bush, 942 S.W.2d 489 (Tenn. 1997), also approved the trial court's instruction to the jury that "the meaning of a life sentence should not be considered in its deliberations." Stephenson, 195 S.W.3d at 605. In Bush, the supreme court stated, "Indeed, the trial court's refusal to give defendant's requested response to the jury question was entirely consistent with prior decisions of this Court holding that the after-effect of a jury's verdict, such as parole availability, is not a proper instruction or consideration for the jury during deliberations." 942 S.W.2d at 503 (citing State v. Caughron, 855 S.W.2d 526, 543 (Tenn. 1993); State v. Payne, 791 S.W.2d 10, 21 (Tenn. 1990)).

[4]In Odom II, our supreme court adopted the analysis of this court, concluding that the option of a sentence of life without the possibility of parole was not available to the defendant. Odom, 137 S.W.3d at 596-97 (appendix).

The defendant argues that the instruction, in effect, informed the jurors that, should they impose a sentence of life imprisonment, the defendant would be eligible for parole in eight years. He complains that this instruction eliminated a reasonable alternative to the death penalty, i.e., a sentence of life. In support of his argument, the defendant analogizes the effect of the instruction provided in the present case to the United States Supreme Court's characterization of an "all or nothing" choice presented by the refusal to instruct on lesser included offenses in Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382 (1980). In Beck, the Court "held unconstitutional a state statute that prohibited lesser included offense instructions in capital cases, when lesser included offenses to the charged crime existed under state law and such instructions were generally given in noncapital cases." Hopkins v. Reeves, 524 U.S. 88, 90, 118 S. Ct. 1895, 1898 (1998). "'The goal of the Beck rule . . . is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence.'" Schad v. Arizona, 501 U.S. 624, 646-647, 111 S. Ct. 2491, 2505 (1991) (quoting Spaziano v. Florida, 468 U.S. 447, 455, 104 S. Ct. 3154, 3159 (1984)). The defendant argues that the jury in his case was forced into an "all-or-nothing" choice between sentencing him to death or to a term of imprisonment which, according to the instruction at trial, could conceivably end in eight years. He asserts that the instruction defining the minimum period of confinement before becoming eligible for parole introduced irrelevant concerns and distortions into the jury's fact-finding process, diverting the jury's attention from the question of law presented in this capital sentencing proceeding.

The Supreme Court acknowledged that due process required the jury to be informed that a defendant was parole ineligible when the prosecution relied upon future dangerousness of the defendant for support of the death penalty. In Simmons v. South Carolina, 512 U.S. 154, 114 S. Ct. 2187 (1994), the jury was provided two sentencing options, life imprisonment and death. Under South Carolina state law, the defendant's prior convictions rendered him ineligible for parole. The trial court refused the defendant's requested instructions defining a life sentence and setting forth his parole ineligibility. On appeal, the United States Supreme Court found in the absence of an instruction setting forth the defendant's parole ineligibility, the jury could have reasonably believed the defendant would be released on parole if he were not executed. The Court explained that to the extent that misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing the defendant to death and sentencing him to a limited period of incarceration. The Supreme Court found the failure to provide the jury with accurate information regarding the defendant's parole ineligibility, combined with the State's argument the defendant would pose a future danger if not executed, denied the defendant due process.

Our supreme court has held that parole eligibility should not be considered as part of deliberations in a capital case. See Bush, 942 S.W.2d at 503 (holding that the after-effect of a jury's verdict is not a proper instruction or consideration for the jury during deliberations).

Indeed, in Bush, the court held, under the reasoning provided in Simmons, that "[s]ince Tennessee is a state in which defendants sentenced to life imprisonment are eligible for parole, Simmons does not require that the jury be given information about parole availability." Austin, 87 S.W.3d at 482 (citing Bush, 942 S.W.2d at 503). In Dellinger, the supreme court noted that "instructions on the nature of life sentences, concurrent and consecutive sentencing, and parole eligibility create the possibility of jury speculation on the length of time a defendant would have to serve and could 'breed irresponsibility on the part of jurors premised upon the proposition that corrective action can be taken by others at a later date.'" 79 S.W.3d at 474-75 (quoting State v. Smith, 857 S.W.2d 1, 11 (Tenn. 1993)).

In the present case, jurors asked several questions relating to the meaning of a life sentence. During the trial, the defense presented evidence that the defendant would never be released on parole. Specifically, Shettles testified that the defendant had been incarcerated at Riverbend Maximum Security Institution for more than fifteen years and that, in her opinion, he would never be paroled if given a life sentence. Shettles added that the Mississippi Department of Corrections had a detainer on the defendant for a life sentence resulting from a murder conviction in that state. She explained that, in the remote chance that he should be released from the custody of the Tennessee Department of Correction, the defendant would be transferred to the Mississippi Department of Corrections to serve a life sentence. The defendant complains that he was presented a "Hobson's choice" as to whether to forgo mitigation evidence relating to his rehabilitation during his period of incarceration at Riverbend. He further disputes the State's claim that he invited error by presenting evidence of his ineligibility for parole. The defendant maintains that the presentation of proof relative to his ineligibility for parole was a response to the error in the jury charge, not an invitation to it.

During closing argument, the State commented, "[W]e have to protect people like [the victim] from people like him, factor that in, in your weighing." Whether this is sufficient to invoke the due process concerns addressed in Simmons we need not determine.[5] The trial court provided an accurate instruction as to the law regarding parole eligibility for a sentence of life imprisonment, accompanied by the admonition that the jury was not to consider parole as an aggravating circumstance. The trial court did advise the jury that the fact that this defendant may never be eligible for parole could be considered as a mitigating circumstance. We cannot conclude that the instruction provided in this case under the circumstances presented by the jurors' questions and with consideration of the proof presented by the

[5]In Simmons, the prosecution argued during closing that the question for the jury was "what to do with [petitioner] now that he is in our midst." 512 U.S. at 157, 114 S. Ct. at 2190. The prosecution further argued that a verdict for death would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense." Id.

defendant and the closing argument made by the State was error. We cannot conclude that the instruction presented the jury with a "false choice" regarding possible punishment. The record reflects that the jury had before it accurate information regarding parole eligibility and the probability that the defendant would never be paroled or, in the event he was released on parole, that he would then immediately begin service of a life sentence in the State of Mississippi. The defendant is not entitled to relief as to this issue.

IV. Review Pursuant to Tenn. Code Ann. § 39-13-206(c)

For a reviewing court to affirm the imposition of a death sentence, Tennessee Code Annotated section 39-13-206(c)(1) requires a determination that:

> (A) The sentence of death was not imposed in an arbitrary fashion;
>
> (B) The evidence supports the jury's finding of statutory aggravating circumstance or circumstances;
>
> (C) The evidence supports the jury's finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances; and
>
> (D) The sentence of death is not excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.

A. Arbitrariness

The sentencing phase in the present case was conducted pursuant to the procedure established in the applicable statutory provisions and rules of criminal procedure. The defendant argues that cumulative error based upon the claims raised in this appeal supports his allegation that the sentencing phase was not conducted pursuant to the applicable statutes and procedural rules. We have concluded that these enumerated claims are without merit and, thus, the sentence of death was not imposed in an arbitrary fashion.

B. Sufficiency of Statutory Aggravating Circumstances Found by the Jury

The jury found the proof established beyond a reasonable doubt two statutory aggravating circumstances: (1) the defendant was previously convicted of a felony whose statutory elements involved violence to the person, and (2) the murder was committed during the perpetration of a robbery. See Tenn. Code Ann. § 39-13-204(i)(2), (7). During the penalty phase, the State introduced proof that the defendant committed a prior murder in the

State of Mississippi. This evidence is sufficient to establish the prior violent felony aggravating circumstance. Tenn. Code Ann. § 39-13-204(i)(2). The State also presented evidence to support the circumstance that the murder was committed during the perpetration or attempt to perpetrate a robbery. Specifically, the defendant's statement was introduced as evidence. In his statement, the defendant conceded that he planned on "snatch[ing] her purse" so he could "get something to eat and catch a nap." He added that he ran toward her with "intentions of snatching her purse and running." The defendant grabbed the victim, and they fell into her car. The defendant admitted looking through her purse but found nothing of value except her car keys. He took the keys but threw them in a hole. These facts were sufficient to conclude that the murder was committed during the perpetration of a robbery.[6]

C. Aggravating Circumstances Outweigh Mitigating Circumstances

The defendant argues that the aggravating circumstances do not outweigh the mitigating circumstances, asserting that his mitigation evidence placed the two statutory aggravators in context by showing that his life history had left him extremely susceptible to maladaptive and criminal behavior.

The mitigation evidence established that the defendant was the second of three children. The quality of the parental care was highly questionable and it appears that his mother abandoned him at a very young age. In fact, his biological parents ceded their parental rights, and the three children were adopted to separate persons from the same family. The defendant's adoptive parents divorced shortly after his adoption. His adoptive mother remarried, and his stepfather abused the defendant and his adoptive brother. The defendant went hungry and was singled out for humiliation and punishment. The defendant was involved in the court system from an early age. A court-ordered psychological evaluation found the need for intervention. The defendant was eventually sent to Columbia Training School. Reports of this facility's abuse and treatment of children in its custody eventually led to numerous federal lawsuits, and the facility was ultimately closed. Two years after his release from Columbia, the defendant committed his first murder. Although he was only seventeen years old, he was sent to Parchman Penitentiary where he suffered sexual abuse by fellow inmates.

The defendant argues that "a child does not choose abandonment and abuse, nor is a child able to protect itself from the ensuing damage" and that he has been desperately seeking

[6]Where, as in the instant case, a felony not underlying the felony murder conviction is used to support the felony murder aggravating circumstance, there is no duplication. State v. Hines, 919 S.W.2d 573, 583 (Tenn. 1995).

stability and structure. He states that he only found himself in a safe, structured environment since being incarcerated at Riverbend and at that time "began a remarkable rehabilitation." While we cannot disagree with the defendant's assertion that a "child does not choose abandonment and abuse," we conclude that the State's proof of the aggravating circumstance was sufficient for the jury to determine that the aggravating circumstance outweighed any mitigating circumstances beyond a reasonable doubt.

D. Proportionality

This court is required by Tennessee Code Annotated section 39-13-206(c)(1)(D) and under the mandates of State v. Bland, 958 S.W.2d 651, 661-74 (Tenn. 1997), to consider whether the defendant's sentence of death is disproportionate to the penalty imposed in similar cases. This court's function is not that of a "super jury" that simply substitutes our judgment for the sentencing jury. State v. Godsey, 60 S.W.3d 759, 782 (Tenn. 2001). Rather, this court's task is to take a broader perspective than the jurors who imposed the sentence of death in order to determine whether the sentence of death in this case "'is disproportionate to the sentences imposed for similar crimes and similar defendants.'" State v. Thacker, 164 S.W.3d 208, 232 (Tenn. 2005) (quoting Bland, 958 S.W.2d at 664). "If a case is 'plainly lacking in circumstances consistent with those in cases where the death penalty has been imposed,' then the sentence is disproportionate." State v. Stout, 46 S.W.3d 689, 706 (Tenn. 2001) (citations omitted).

In conducting our proportionality review, this court must compare the present case with cases involving similar defendants and similar crimes. See State v. Rice, 184 S.W.3d 646, 679 (Tenn. 2006). We select only from those cases in which a capital sentencing hearing was actually conducted to determine whether the sentence should be life imprisonment, life imprisonment without the possibility of parole, or death. See State v. Carruthers, 35 S.W.3d 516, 570 (Tenn. 2000) (citations omitted). We begin with the presumption that the sentence of death is proportionate with the crime of first degree murder. See Terry v. State, 46 S.W.3d 147, 163 (Tenn. 2001) (citing State v. Hall, 958 S.W.2d 679, 699 (Tenn. 1997)).

Applying this approach, the court, in comparing this case to other cases in which the defendants were convicted of the same or similar crimes, looks at the facts and circumstances of the crime, the characteristics of the defendant, and the aggravating and mitigating factors involved. See Terry, 46 S.W.3d at 164. Regarding the circumstances of the crime itself, numerous factors are considered, including: (1) the means of death, (2) the manner of death, (3) the motivation for the killing, (4) the place of death, (5) the victim's age, physical condition, and psychological condition, (6) the absence or presence of provocation, (7) the absence or presence of premeditation, (8) the absence or presence of justification, and (9) the

injury to and effect on non-decedent victims. Stout, 46 S.W.3d at 706 (citing Bland, 958 S.W.2d at 667); see also Terry, 46 S.W.3d at 164. Contemplated within the review are numerous factors regarding the defendant, including: (1) prior criminal record, (2) age, race, and gender, (3) mental, emotional, and physical condition, (4) role in the murder, (5) cooperation with authorities, (6) level of remorse, (7) knowledge of the victim's helplessness, and (8) potential for rehabilitation. Stout, 46 S.W.3d at 706; Terry, 46 S.W.3d at 164.

In completing our review, we remain cognizant of the fact that "no two cases involve identical circumstances." See, generally, Terry, 46 S.W.3d at 164. Accordingly, there is no mathematical or scientific formula to be employed. Thus, our function is not to limit our comparison to those cases where a death sentence "is perfectly symmetrical," but rather, our objective is only to "identify and to invalidate the aberrant death sentence." Terry, 46 S.W.3d at 164 (citing Bland, 958 S.W.2d at 665).

The circumstances surrounding the murder in light of the relevant and comparative factors reveal that, the defendant, armed with a knife, watched as an elderly woman parked her car, alone, in a parking garage. Without provocation, he surprised his elderly victim and overpowered her at knifepoint, forcing her into the backseat of her car. When his victim asked him what he was doing, he told her he was going to rape her, saying, "I'll give you your damn son." Before raping her, he stabbed the victim in her heart, right lung, and liver. While she was bleeding to death, the defendant grabbed her from behind and raped her so savagely that he tore her vagina and caused bleeding from her anal and vaginal openings. The defendant left two bloody handprints on the victim's hips. Throughout the entire order, the elderly victim was alive and conscious. In fact, she spoke to the defendant, saying that "she had never had sex before." After stabbing and raping the victim, the defendant left her to bleed to death in the backseat while he rummaged through her billfold looking for anything of value. After searching through her belongings, he left her in the car to die, threw her car keys down a stairwell, and left the scene to hide his clothes and cover up his crime. The defendant cooperated with the police to the extent that after initially giving the police a statement under the alias of "Otis Smith," he eventually confessed to the murder and rape. After confessing, he told police that he needed help mentally and pyschologically.

The defendant's background includes the facts that he was convicted for the 1978 murder of Becky Roberts in Mississippi and had escaped from a Mississippi prison before making his way to Memphis. Evidence was presented establishing that the defendant was neglected and then abandoned by his biological parents. He was later adopted. As a child, the defendant was physically, emotionally, and sexually abused by his stepfather. At age thirteen, the defendant was institutionalized where a psychologist found him to be incorrigible, brain damaged, and unfit for society. The defendant was released from the institution at age sixteen and murdered Becky Roberts the following year.

While no two capital cases and no two capital defendants are alike, we have reviewed the circumstances of the present case with similar first degree murder cases and conclude that the penalty imposed in the present case is not disproportionate to the penalty imposed in similar cases. See, e.g., State v. Chalmers, 28 S.W.3d 913, 919 (Tenn. 2000) (finding (i)(2) and (i)(7) aggravating circumstances and imposing death where defendant shot and robbed sixty-nine-year-old victim); Smith, 993 S.W.2d at 20-21 (twenty-three-year-old defendant admitted to drinking alcohol and taking drugs prior to robbery and murder of victim and cooperated with authorities, death sentence upheld based upon (i)(2) aggravator); State v. Burns, 979 S.W.2d 276 (Tenn. 1998) (defendant shot and killed victim during course of attempted robbery, evidence presented of defendant's religious faith and activities, death sentence upheld based upon (i)(5) aggravator); State v. Cribbs, 967 S.W.2d 773, 782 (Tenn. 1998) (twenty-three-year-old defendant murdered female victim during robbery of victim's residence, death sentence upheld based upon (i)(2) aggravator); Bush, 942 S.W.2d at 504-06 (finding (i)(5) and (i)(6) aggravating circumstances and imposing death despite evidence that defendant had troubled childhood and mental disease or defect); State v. Howell, 868 S.W.2d 238, 262 (Tenn. 1993) (twenty-seven-year-old defendant shot clerk in the head during robbery of convenience store, death sentence upheld based upon (i)(2) aggravator); State v. Van Tran, 864 S.W.2d 465 (Tenn. 1993) (nineteen-year-old defendant killed seventy-four-year-old woman during robbery of Chinese restaurant by shooting victim in head, death sentence upheld based upon (i)(5) and (i)(12) aggravators); State v. Harries, 657 S.W.2d 414, 421 (Tenn. 1983) (thirty-one-year-old male defendant shot and killed clerk during robbery of convenience store, death sentence upheld based upon (i)(2) aggravator); State v. Coleman, 619 S.W.2d 112, 115 (Tenn. 1981) (twenty-two-year-old defendant shot and killed sixty-nine-year-old victim during course of robbery, death sentence upheld based upon (i)(2) aggravator).

The defendant argues that his childhood experience created a lasting impact. He also argues that he has demonstrated rehabilitation while in the Tennessee Department of Correction. However, it is clear that the death penalty has been upheld in cases where defendants experienced similar childhood trauma and/or difficulties:

- In State v. Coe, 655 S.W.2d 903 (Tenn. 1983), the death penalty was upheld where the defendant presented dysfunctional family history, including sexual abuse of siblings committed by father in defendant's presence.

- In State v. Hines, 919 S.W.2d 573 (Tenn. 1995), the death penalty was upheld where the defendant presented proof of a troubled childhood, alcoholic mother, and abandonment from his parents.

- In State v. Blanton, 975 S.W.2d 269 (Tenn. 1998), the death penalty was upheld where the defendant presented proof that his father was a violent man who would come home drunk and beat his wife and children. The defendant grew up in poor economic conditions. The defendant's father went to prison. The defendant's mother married another man who was a good father, but he died two years after the marriage. The defendant's mother died three years after the stepfather.

- In State v. Keen, 31 S.W.3d 196, 204 (Tenn. 2000), the defendant's natural father was physically and emotionally abusive. His father moved the children excessively to escape charges on theft and child neglect. During a two-year period, his father moved the family twenty-six times. The children were beaten on a daily basis, sometimes with electrical cords and pieces of lumber. The father also slaughtered livestock in front of his children while threatening to do the same to them if they misbehaved. One of the defendant's sisters, who admitted being the victim of sexual abuse, described their childhood as "an environment of terror." Even after the defendant was abandoned by his natural parents, he was placed in an abusive foster home before being adopted by the Brieschkes. The Brieschkes testified that the defendant was malnourished when he was first adopted and was very nervous and upset. The defendant was diagnosed with Attention Deficit Disorder in the fourth grade. The defendant raped and strangled his eight-year-old victim. The death penalty was upheld.

- In State v. Joel Richard Schmeiderer, No. M2007-01922-CCA-R3-DD, 2009 WL 961787, at *31-32 (Tenn. Crim. App., at Nashville, Apr. 9, 2009), the death penalty was upheld where the defendant presented evidence of a traumatic childhood. His mother was a teenager when he was born. The defendant's father was a married man thirteen years older than his seventeen-year-old mother. The defendant's father denied the pregnancy and was not affectionate or supportive of the defendant. His father's other children hit, pushed, and threw things at the defendant. The defendant got into trouble in high school and was sent to alternative school.

Our review of these cases shows that the sentence of death imposed upon the defendant is proportionate to the penalty imposed in similar cases. In so concluding, we have considered the entire record and conclude that the sentence of death was not imposed arbitrarily, that the evidence supports the finding of the (i)(2) and (i)(7) aggravators, that the evidence supports the jury's finding that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt, and that the sentence is not excessive or disproportionate.

V. Waiver of Right to Testify

The defendant asserts that the colloquy neither with his counsel nor the trial court established that his waiver of his right to testify at the sentencing hearing was knowing, intelligent, and voluntary as required by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 8, 9, and 16 of the Tennessee Constitution. During the defendant's colloquy regarding his decision whether to testify, an extended discussion occurred regarding discovery sought by the defendant in an *ex parte* fashion. Such discovery was ordered by the trial court but was reversed by this court on interlocutory appeal. See State v. Richard Odom, No. W2006-00716-CCA-R10-DD, 2007 WL 1135516, at *1 (Tenn. Crim. App., at Jackson, Apr. 13, 2007). The record reflects that the defendant was of the opinion that he could not testify without having the evidence he was seeking to gain through the *ex parte* proceedings. The defendant complains that he was not advised that if he chose to testify about collateral mitigating circumstances he could not be cross-examined about the crime unless he opened the door, but he concedes that this issue has been previously decided adversely to him by the Tennessee Supreme Court in State v. Rimmer, 250 S.W.3d 12 (Tenn. 2008).

A criminal defendant has a fundamental right to testify in his or her own behalf at trial. Momon v. State, 18 S.W.3d 152, 157 (Tenn. 1999). This right may only be waived personally by the defendant. Id. Additionally, a right that is fundamental and personal to the defendant may only be waived if there is evidence in the record demonstrating "an intentional relinquishment or abandonment of a known right or privilege." Id. at 162. A waiver of this right may not be presumed from a silent record. Id.

In Momon, our supreme court outlined specific procedures for ensuring that a waiver is properly recorded. The defense should request, and the trial court should permit, a hearing out of the presence of the jury to establish on the record that the defendant has personally made a knowing, intelligent, and voluntary waiver. The trial court must determine that:

> (1) the defendant has the right not to testify, and if the defendant does not testify, then the jury (or court) may not draw any inferences from the defendant's failure to testify;
>
> (2) the defendant has the right to testify and that if the defendant wishes to exercise that right, no one can prevent the defendant from testifying;
>
> (3) the defendant has consulted with his or her counsel in making the decision whether or not to testify; that the defendant has been advised of the advantages and disadvantages of testifying; and that the defendant has voluntarily and

personally waived the right to testify.

Id. The Momon court recognized that "[d]efense counsel is generally in the best position to voir dire the defendant." Id. Thus, "[u]nder normal circumstances, . . . the trial judge should play no role in this procedure." Id. The court further noted that this approach, which minimizes judicial interference, strikes the proper balance between the preservation of a confidential right and the need to protect the relationship and confidences between counsel and client. Id. Defense counsel and trial courts "should adhere to these procedural guidelines in all cases tried or retried after the date of this decision." Id. at 163. The court noted, however, that the "procedures are prophylactic measures which are not themselves constitutionally required." Id. And, the failure to follow the Momon guidelines will not alone support a claim for deprivation of the constitutional right to testify if there is evidence in the record to establish that the right was otherwise personally waived by the defendant. Id.

In Rimmer, the trial court conducted a hearing out of the presence of the jury. During questioning by counsel, Rimmer acknowledged that he had been advised of his right to testify in the sentencing hearing and that he had personally made the decision not to do so. On appeal, he argued that his right to testify was not properly waived because his counsel did not inform him about the limits to cross-examination in capital cases. Rimmer, 250 S.W.3d at 28. Specifically, Rimmer stated that had his counsel informed him of the ruling in State v. Cazes, 875 S.W.2d 253 (Tenn. 1994),[7] limiting cross-examination to mitigating factors, he would have chosen to testify instead of insisting upon his right to remain silent.

In its ruling, the court noted that Rimmer failed to cite to and the court was unable to find a case from any other jurisdiction that requires a defendant to acknowledge this awareness of a limited cross-examination rule. Rimmer, 250 S.W.3d at 28. The supreme court was unwilling to expand the Momon inquiry and determined that the "three general inquiries laid out in Momon are sufficient to ensure a personal waiver of the right to testify in a sentencing hearing." Id. (citation omitted). In so holding, our supreme court acknowledged that "an expanded Momon proceeding, requiring a defendant and his counsel to place on the record the advantages and disadvantages of testifying in open court, would infringe upon the attorney-client privilege." Id. The supreme court noted that "courts should guard against overreaching intrusions into the specifics of the defense strategy." Id. Accordingly, the Rimmer court declined to conclude that the failure to explain this evidentiary rule on the record invalidates the waiver of the right to testify. Id.

[7] In Cazes, our supreme court held that a defendant does not waive his Fifth Amendment right against self-incrimination by testifying to mitigating factors that are wholly collateral to the murder. 875 S.W.2d at 266.

As in Rimmer, the defendant's argument contesting the validity of the waiver of his right to testify focuses upon the failure of the record to demonstrate that he was advised of the limited privilege against self-incrimination, i.e., an ability to testify about mitigating circumstances and not be cross-examined about the facts and circumstances of the murder unless he opened the door. The defendant took the stand and was questioned by defense counsel regarding his decision to testify on his own behalf. The defendant concedes that the "colloquies with counsel and the court ostensibly satisfied the procedural requirements of Momon."

The defendant was informed that he had a right to testify as well as not to do so. There is no indication in the record that the defendant failed to understand the consequences of his decision not to testify. We reject the defendant's argument that he was not sufficiently advised of the salient consequences of exercising his fundamental constitutional right to testify. We further conclude that the record reflects that the defendant's waiver of his constitutional right was voluntarily, knowingly, and intelligently made. The defendant is not entitled to relief on this issue.

VI. Instruction on Reasonable Doubt

The defendant argues that the trial court's pattern jury instruction on reasonable doubt impermissibly lowered the prosecution's burden of proof. The trial court instructed the jury as follows:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such investigation to let the mind rest easily as to the certainty of your verdict.
>
> Reasonable doubt does not mean a doubt that may arise from possibility.
>
> Absolute certainty is not demanded by the law. But moral certainty is required. And this certainty is required as to every proposition of proof requisite to constitute the verdict.

The defendant argues that the exclusion of "doubt that may arise from possibility" suggests an improperly high degree of doubt for acquittal and lowers the prosecution's burden of proof. He continues that "a reasonable doubt can only arise from 'possibility.'"

"[T]he Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." Victor v. Nebraska, 511 U.S. 1, 5, 114 S. Ct. 1239, 1243 (1994). Furthermore, "so long as the court instructs the jury on the necessity that

the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." Id. (citations omitted). Rather, "taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury." Holland v. United States, 348 U.S. 121, 140, 75 S. Ct. 127, 138 (1954).

An almost verbatim instruction on reasonable doubt was reviewed by our supreme court in Rimmer:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such investigation to let the mind rest easily upon the certainty of guilt.
>
> Reasonable doubt does not mean a doubt that may arise from possibility.
>
> Absolute certainty is not demanded by the law.

250 S.W.3d at 30. As in the present appeal, Rimmer challenged the phrase "reasonable doubt does not mean a doubt that may arise from possibility," arguing that the phrase lowered the burden of proof from guilt beyond a reasonable doubt. In reviewing the instruction, our supreme court noted that "[j]ury instructions must be reviewed in their entirety" and that "[p]hrases may not be examined in isolation." Id. at 31 (citations omitted). The court noted: "The sentence preceding the phrase at issue explains that reasonable doubt is the inability to 'let the mind rest easily upon the certainty of guilt' after reviewing all the facts. The sentence following directs that absolute certainty of guilt is not required." Id. In reviewing this phrase in context, our supreme court concluded that "a fair interpretation is that reasonable doubt does not mean a doubt that may arise from mere possibility no matter how improbable." Id. The supreme court additionally considered whether any harm resulted to Rimmer by an ambiguous instruction. The court noted that "[o]ne ambiguous term does not necessarily constitute error." Id. The court then concluded that "a reasonable likelihood [did not exist] that the jury applied the burden of proof in an unconstitutional way." Id. (citing Estelle v. McGuire, 502 U.S. 62, 72, 112 S. Ct. 475 (1991)). Notwithstanding, the Tennessee Supreme Court acknowledged that the language of this particular instruction was not necessarily helpful and discouraged the further use of this particular instruction. Id.

The resentencing hearing in the present case was held prior to the filing of the supreme court's opinion in Rimmer. Accordingly, the trial court was not privy to the supreme court's advice on continued use of this instruction. However, numerous decisions have concluded that the exact or substantially similar instruction submitted to the jury in this case was not error. See State v. Hall, 976 S.W.2d 121, 159 (Tenn. 1998); Bush, 942 S.W.2d

at 520-521. Tennessee courts have consistently approved jury instructions patterned after T.P.I. Crim. 2.03. See, e.g., State v. Nichols, 877 S.W.2d 722 (Tenn. 1994); State v. Sexton, 917 S.W.2d 263 (Tenn. Crim. App. 1995). Finally, in Kiser, 284 S.W.3d at 292, our supreme court adopted this court's approval of a virtually verbatim reasonable doubt instruction. In Kiser, the trial court instructed the jury as follows:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty is not demanded by the law, to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense.

Id. (appendix). In Kiser, the defendant, as in the present case, argued that the inclusion of the phrase "doubt that may arise from possibility" "suggests an improperly high degree of doubt for acquittal and lowers the prosecution's burden of proof." Id. This court rejected the challenge, noting that this instruction has been consistently upheld as satisfying all constitutional requirements. Id. (citing Bush, 942 S.W.2d at 521). Accordingly, we cannot conclude that the reasonable doubt instruction in the present case violated the defendant's due process rights. The defendant is not entitled to relief as to this claim.

VII. Tennessee Death Penalty Statutes Are Unconstitutional

The defendant raises numerous challenges to the constitutionality of Tennessee's death penalty provisions. Included within his challenge that the Tennessee death penalty statutes violate the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and Article I, Sections 8, 9, 16, and 17, and Article II, Section 2 of the Tennessee Constitution are the following:

A. Failure to Apply Mills/McCoy Decisions

The defendant argues that requiring a jury to unanimously agree to a life sentence violates the United States Supreme Court's holdings in Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860 (1988), and McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227 (1990). This argument has been repeatedly rejected. See Kiser, 284 S.W.3d at 292-93; State v. Ivy, 188 S.W.3d 132, 163 (Tenn. 2006) (citing State v. Brimmer, 876 S.W.2d 75, 87 (Tenn. 1994)).

B. Failure to Apply Blakely/Apprendi/Recuenco Decisions

The defendant argues that the imposition of the death penalty violates due process of law because the aggravating circumstances were not set forth in the indictment. In this regard, he contends that any fact that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt in order to satisfy the Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees. With reliance upon Apprendi v. New Jersey and Ring v. Arizona, the defendant submits that he was denied due process of law because the indictment returned by the grand jury did not include facts that would qualify him for the death penalty. In order to elevate the crime to capital murder, he alleges that the indictment must include language of the statutory aggravating circumstance(s).

The Tennessee Supreme Court has consistently rejected this argument by holding that aggravating circumstances need not be pled in the indictment. State v. Reid, 164 S.W.3d 286, 312 (Tenn. 2005); State v. Leach, 148 S.W.3d 42, 59 (Tenn. 2004); State v. Berry, 141 S.W.3d 549, 562 (Tenn. 2004); State v. Holton, 126 S.W.3d 845, 863 (Tenn. 2004). Our supreme court explained, "[t]he focus in Apprendi, Ring, and Blakely was on the Sixth Amendment right to trial by jury," and "the Court expressly declined to impose the Fifth Amendment right to presentment or grand jury indictment upon the States." Berry, 141 S.W.3d at 560. Accordingly, this assignment is without merit.

C. Unlimited Discretion is Vested in the Prosecutor

The defendant challenges the propriety of the prosecutor's unlimited discretion as to whether to seek the death penalty, asserting that this unfettered discretion constitutes an improper delegation of judicial power in violation of Article II, Section 2 of the Tennessee Constitution. Our supreme court has rejected the argument that the prosecutors' unlimited discretion in this state to decide whether to seek the death penalty in a first degree murder case causes the system as a whole to be arbitrary and capricious. See Hines, 919 S.W.2d at 582.

D. The Death Penalty is Imposed in a Discriminatory Manner

The defendant argues that the death penalty is imposed in a discriminatory manner based upon location of the offense, race of defendant and victim, gender of defendant and victim, and economic status of defendant and victim. This argument has been rejected. See Hines, 919 S.W.2d at 582; Brimmer, 876 S.W.2d at 87; Smith, 857 S.W.2d at 23.

E. Failure to Articulate or Apply Meaningful Standards for Proportionality Review Violates Due Process

The defendant argues that the appellate review process in death penalty cases is constitutionally inadequate in its application because, in his view, the methodology of review is flawed. This argument has been specifically rejected by our supreme court on numerous occasions. See Cazes, 875 S.W.2d at 270-71; see also State v. Harris, 839 S.W.2d 54, 77 (Tenn. 1992); State v. Barber, 753 S.W.2d 659, 664 (Tenn. 1988). Moreover, the supreme court has held that "[w]hile important as an additional safeguard against arbitrary or capricious sentencing, comparative proportionality review is not constitutionally required." Bland, 958 S.W.2d at 663 (footnote omitted). Accordingly, this argument is without merit.

F. Lethal Injection is Cruel and Unusual Punishment

The defendant argues that lethal injection, the method of execution currently utilized by the Tennessee Department of Correction, constitutes cruel and unusual punishment, because the use of Pavulon with sodium pentothal and potassium chloride creates a risk of unnecessary physical and psychological suffering, and because the lethal injection protocol lacks written provisions or other appropriate safeguards. We disagree.

The Tennessee Supreme Court upheld Tennessee's three-drug lethal injection protocol in Abdur'Rahman v. Bredesen, 181 S.W.3d 292, 297-98 (Tenn. 2005). The supreme court rejected another challenge to the protocol in State v. Banks, 271 S.W.3d 90, 160 (Tenn. 2008), cert. denied, __ U.S. __, 129 S. Ct. 1677 (2009). In Baze v. Rees, 553 U.S. 35, 128 S. Ct. 1520 (2008), the United States Supreme Court upheld the State of Kentucky's lethal-injection protocol as not being violative of the Eighth Amendment. The Supreme Court's plurality found that cruel and unusual punishment occurs where lethal injection as an execution method presents a "substantial" or "objectively intolerable risk of serious harm" in light of "feasible, readily implemented" alternative procedures. Id., 553 U.S. at __, 128 S. Ct. at 1531-32. However, the analysis was focused on the manner of lethal injection. Id., 553 U.S. at __, 128 S. Ct. at 1537. The Baze Court held:

> Kentucky has adopted a method of execution believed to be the most humane available, one it shares with 35 other States . . . [which] if administered as intended . . . will result in a painless death. The risks of maladministration . . . such as improper mixing of chemicals and improper setting of IVs by trained and experienced personnel-cannot remotely be characterized as "objectively intolerable." Kentucky's decision to adhere to its protocol despite these asserted risks, while adopting safeguards to protect against them, cannot be viewed as probative of the wanton infliction of pain

under the Eighth Amendment.

Id., 553 U.S. at __, 128 S. Ct. at 1537-38. For "the disposition of other cases uncertain," Chief Justice Roberts stated that "[a] State with a lethal injection protocol *substantially similar* to the protocol we uphold today would not create a risk that meets [the 'substantial risk'] standard." Id., 553 U.S. at __, 128 S. Ct. at 1537 (emphasis added). The protocol adopted in Kentucky involves the combination of three drugs: the first, sodium thiopental, induces unconsciousness when given in the specified amounts and thereby ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs, pancuronium bromide and potassium chloride. Among other things, Kentucky's lethal injection protocol reserves to qualified personnel having at least one year's professional experience the responsibility for inserting the intravenous (IV) catheters into the prisoner, leaving it to others to mix the drugs and load them into syringes; specifies that the warden and deputy warden will remain in the execution chamber to observe the prisoner and watch for any IV problems while the execution team administers the drugs from another room; and mandates that if, as determined by the warden and deputy, the prisoner is not unconscious within sixty seconds after the sodium thiopental's delivery, a new dose will be given at a secondary injection site before the second and third drugs are administered. Id., 553 U.S. at __, 128 S. Ct. at 1522.

Tennessee has adopted a three-drug protocol for lethal injection similar to that of Kentucky. See, e.g., Baze, 553 U.S. at __, 128 S. Ct. at 1527; Workman v. Bredesen, 486 F.3d 896, 902 (6th Cir. 2007); Kiser, 284 S.W.3d at 275-76; Abdur'Rahman, 181 S.W.3d at 314; see also Steve Henley v. George Little, No. 3:08-1148, 2009 WL 211139, at *1 (M.D. Tenn. Jan. 26, 2009). Therefore, we are unable to conclude that Tennessee's lethal injection procedure, which appears facially similar to the procedure considered in Baze, is unconstitutional. The defendant is not entitled to relief on this claim.

CONCLUSION

In accordance with the mandate of Tennessee Code Annotated section 39-13-206(c)(1) and the principles adopted in prior decisions of the Tennessee Supreme Court, we have considered the entire record in this cause and find the sentence of death was not imposed in any arbitrary fashion and that the evidence supports, as previously discussed, the jury's finding of the statutory aggravating circumstances and the jury's finding that the aggravating circumstances outweighed mitigating circumstances beyond a reasonable doubt. Tenn. Code Ann. § 39-13-206(c)(1)(A)(C). A comparative proportionality review, considering both "the nature of the crime and the defendant," convinces us that the sentence

of death is neither excessive nor disproportionate to the penalty imposed in similar cases. Accordingly, we affirm the sentence of death imposed by the trial court.

_____

ALAN E. GLENN, JUDGE